



POLICE DEPARTMENT
Office of Deputy Commissioner,
Legal Matters
One Police Plaza, Room 1406A
New York, New York 10038

November 26, 2019

T. McElwee
Muckrock
82889-94495832@requests.muckrock.com

RE: FREEDOM OF INFORMATION LAW
REQUEST: FOIL-2019-056-19756
Re: Caracappa/Eppolito Personnel Files

Dear Sir or Madam:

This letter is in response to your email dated November 26, 2019, appealing the determination of the Records Access Officer (RAO) made on November 11, 2019 regarding records requested from the New York City Police Department. Your request, pursuant to the Freedom of Information Law, was originally received by the FOIL unit on November 6, 2019 and subsequently denied by the RAO.

The appeal is denied because the records requested consist of Police Officer personnel records and are therefore exempt from disclosure under the provisions of Civil Rights Law Section 50-a [§87(2)(a)]. The records you have requested, as you describe in your request, are "used to evaluate the performance of a police officer in connection with continued employment or promotion" and are therefore barred from disclosure. The exemption survives a former Officer's death just as it does his or her retirement (as determined by the Appellate Division, Third Department in *Matter of Columbia-Greene Beauty Sch., Inc*, 121 AD3d at 1370-1371).

The Courts have determined that "Documents pertaining to an officer's misconduct are the type of records specifically intended to be kept confidential under the statute, mainly to prevent use of the records in litigation to harass, embarrass, degrade or impeach an officer's integrity" *Matter of Prisoners' Legal Servs. of NY*, 73 NY2d at 31-32. Despite the Officers being deceased, their reputations and/or integrity can still be subject to embarrassment or degradation. Moreover, the exemption to FOIL requests contained in Civil Rights Law §50-(a) must be applied in a meaningful, even-handed manner to prevent "harassment or reprisals against an officer . . . or his/her family". *Daily Gazette Co. v City of Schenectady*, 93 NY2d 145, at 154-155 [1999]) (italics added for emphasis).

Moreover, as it pertains to records withheld because they are specifically exempted by state or federal statute [§87(2)(a)], the Court of Appeals has repeatedly held that "FOIL's statutory scheme separately makes clear that redacted disclosure cannot be compelled where, as here, an agency has met its burden of demonstrating that records are exempt from disclosure under Public Officers Law §87(2)(a)." Therefore, because the requested records are specifically exempted from

COURTESY • PROFESSIONALISM • RESPECT

disclosure pursuant to Civil Rights Law §50-a, this agency is, "not obligated to provide the records even though redaction might remove all details which 'tend to identify the victim,'" *Karlin v. McMahon*, 96 N.Y.2d 842, 729 N.Y.S.2d 435 (2001), *citing Short v. Board of Managers of Nassau County Medical Center*, 57 N.Y.2d 399, 456 N.Y.S. 2d 724 (1982).

In addition, disclosure of the records would reveal the personally identifying information of both the subject of any complaint(s) as well as the complainant(s) and/or witness(es), as well as any statements made in cooperation with certain investigations, which would constitute an unwarranted invasion of personal privacy [POL §87(2)(b); §89(2)] and could endanger the life or safety of the individual(s) [§87(2)(f)].

The release of personal and/or identifying information would impede the law enforcement capabilities of this agency and hamper future efforts to secure the cooperation of informants and witnesses. See Public Officers Law §§ 87(2)(e) and (f); *Matter of Moore v. Santucci*, 151 A.D.2d 677 (2d Dep't 1989); *In re Knight v. Gold*, 53 A.D.2d 694 (2d Dep't 1976). Also, disclosure would reveal personally identifying information of Uniformed Members of the Service which could expose those officers and their families to threats and/or harassment.

"Public Officers Law § 87(2)(f) permits an agency to deny access to records, that, if disclosed, could endanger the life or safety of any person. The agency in question need only demonstrate a possibility of endanger[ment]' in order to invoke this exemption" *Matter of Bellamy v New York City Police Dept.*, 87 A.D.3d 874, 875 (1st Dept 2011), quoting *Matter of Connolly v New York Guard*, 175 A.D.2d 372, 373 (3d Dept 1991) affd 20 N.Y.3d 1028 (2013); see *Matter of Ruberti v New York Div. of State Police*, 218 A.D.2d 494, 499 (3d Dept 1996). As mentioned above, the disclosure of personally identifying information or other detailed allegations or complaints – whether or not determined to be unfounded – could expose the subject officer to threats and/or potential violence.

There is no requirement that this agency demonstrate the existence of a specific threat or intimidation; rather a showing must be made of a "possibility of endanger[ment]" to invoke this exemption *Matter of Exoneration Initiative v New York City Police Dept.*, 114 A.D.3d 436, 438 (1st Dept 2014); *see Matter of Gould v New York City Police Dept.*, 89 N.Y.2d 267, 277-278 (1996).

Finally, the appeal is denied pursuant Public Officers Law (POL) Section 87(2)(e)(iv), because disclosure of the withheld records would reveal non-routine criminal investigative techniques or procedures; specifically, as it pertains to internal investigations conducted by this agency. "Indicative, but not necessarily dispositive, of whether investigative techniques are nonroutine is whether disclosure of these procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel" (*see, Matter of Moore v. Santucci*, 151 A.D.2d 677 (2d Dep't 1989), citing, *Matter of Fink v Lefkowitz*, 47 N.Y.2d 567, 572, *supra*). Providing the requested records regarding internal investigations conducted by this Department would provide the public with a blueprint for how this agency investigates complaints of misconduct or corruption and how to use that information to make future complaints.

You may seek judicial review of this determination by commencing an Article 78 proceeding within four months of the date of this decision.

Respectfully,



Jordan S. Mazur
Sergeant
Records Access Appeals Officer

c: Committee on Open Government